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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

OCT 2 2 2010

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The director subsequently reopened the petition and requested additional evidence. The director later denied the petition, and the petitioner appealed. The appeal is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a computer software consulting and development company. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 17, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. The equivalent of an advanced degree is either a U.S. baccalaureate or foreign equivalent degree followed by at least five years of "progressive experience" in the specialty. 8 C.F.R. § 204.5(k)(2).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on September 19, 2002. The proffered wage as stated on the Form ETA 750 is $80,000.00 per year. The Form ETA 750 states that the position requires a bachelor's degree in computer science or an equivalent degree and five years of experience in the job offered or seven years of experience in a related occupation.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of more than two million dollars, net annual income of more than one hundred thousand dollars, and to currently employ 10 workers. According to the tax returns in the record, the petitioner's fiscal year begins on July 1 and ends on June 30. On the Form ETA 750B, signed by the beneficiary on August 21, 2002, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has submitted copies of Forms W-2, Wage and Tax Statement, which it issued to the beneficiary for the years 2003 through 2005. These show that the beneficiary was paid as follows:

Year	Form W-2 Wages	Difference Between Proffered Wage and W-2 Wages
2002	$30,636.96	$49,363.04
2003	$40,051.44	$39,948.56

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

2004	$47,247.36	$32,752.64
2005	$62,739.00	$17,261.00
2006	$80,542.00	N/A
2007	$81,042.50	N/A

As the petitioner paid the beneficiary more than the proffered wage in 2006 and 2007, it has established its ability to pay the proffered wage for those years. The petitioner must establish its ability to pay the difference between the proffered wage and wages actually paid to the beneficiary in 2002, 2003, 2004 and 2005.

As noted by the director, the petitioner has filed several Form I-140 petitions. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

Counsel states that the petitioner has filed the following Form I-140 petitions.

Receipt Number	Beneficiary	Filing Date	Proffered Wage
[redacted]	[redacted]	11162006	$80,000
		07032007	$80,000
		07232007	$80,000
		04142004	$90,000
		02232006	$70,034
		06082006	$80,000
		Total	**$480,034**

Counsel notes that the petitions filed on behalf of [redacted] have been approved. Counsel asserts that the petitioner is only required to establish its ability to pay the proffered wages of those petitions which are currently pending. However, as noted by the director and as noted above, the petitioner must establish its ability to pay the proffered wages as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142; *see also* 8 C.F.R. § 204.5(g)(2). There is no evidence in the record that the beneficiaries listed above have obtained lawful permanent residence. Therefore, the petitioner must establish its ability to pay the combined proffered wages of all petitions filed and/or pending as of the priority date of the instant petition. In addition, it is noted that the petitioner has filed at least three petitions (receipts numbers [redacted] for which information has not been

provided. However, as shown below, since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wages to beneficiaries listed by counsel, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wages to the beneficiaries of the other petitions not listed by counsel.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for the years 2002 through 2005, as shown in the table below.

- In 2002, the Form 1120 stated net income of $4,999.00
- In 2003, the Form 1120 stated net income of $40,356.00.
- In 2004, the Form 1120 stated net income of $112,780.00.
- In 2005, the Form 1120 stated net income of $85,284.00.

The petitioner did not have sufficient net income to pay the proffered wage in 2002.

In 2003, as noted above, the petitioner paid the beneficiary $40,051.44, which is $39,948.56 less than the proffered wage. Although the petitioner's net income for 2003 was greater than the difference between proffered wage and wages actually paid to the beneficiary in 2003, this does not establish that the petitioner had the ability to pay the proffered wage in 2003. As noted above, the petitioner has filed multiple petitions and must establish its ability to pay the proffered wages to each of the beneficiaries of those petitions as of the priority date. Counsel notes that the petition filed on behalf of [redacted] has a priority date of September 15, 2003. The proffered wage, according to counsel, is $80,000.00. Counsel has submitted a copy of the Form W-2 issued to [redacted] in 2003, which shows that the petitioner paid [redacted] $41,486.34 in 2003, which is $38,514.00 less than the proffered wage. The combined difference between the proffered wages and the wages actually paid to [redacted] and the beneficiary in the instant case is $78,462.56, which is greater than the petitioner's net income for 2003. Therefore, the petitioner did not have sufficient net income to pay the difference between the proffered wages and wages actually paid to all beneficiaries in 2003.

The record does not contain any evidence of wages paid to [redacted] for 2004 or 2005. Nor does the record contain evidence of wages paid to the beneficiaries of other Form I-140 petitions which were filed or had priority dates in 2004 or 2005. Thus, although the petitioner's net income in 2004 and 2005 exceeded the proffered wage in the instant case, the petitioner has not established that it had sufficient net income to pay the proffered wages to the beneficiaries of all petitions which were pending or had priority dates in 2004 or 2005.
If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current

[2]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2002, 2003, 2004 and 2005, as shown in the table below.

- In 2002, the Form 1120 stated net current assets of $24,487.00.
- In 2003, the Form 1120 stated net current assets of $13,456.00.
- In 2004, the Form 1120 stated net current assets of $108,242.00.
- In 2005, the Form 1120 stated net current assets of $9,693.00.

The petitioner did not have sufficient net current assets to pay the difference between the proffered wage and wages actually paid to the beneficiary in 2002, 2003 or 2005.

The petitioner had sufficient net current assets to pay the difference between the proffered wage and wages actually paid to the beneficiary in 2004. However, as noted above, the petitioner has filed multiple petitions. The petitioner has not established that it had sufficient net current assets to pay the proffered wages for all beneficiaries in 2004.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, net income or net current assets.

On appeal, counsel asserts that the fact that the petitioner is currently paying the beneficiary a salary which is greater than the proffered wage is sufficient to establish that the petitioner has the ability to pay the proffered wage. However, the regulations require the petitioner to establish that it had the ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Thus, although the petitioner may currently be paying the proffered wage, this does not establish that the petitioner had the ability to pay as of the priority date as required by the regulation.

Counsel also states that USCIS has exceeded its authority in requiring the petitioner to establish its ability to pay the proffered wages for all of the Form I-140 petitions that were filed and/or pending as of the priority date in the instant case. As noted above, the petitioner must establish that the job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (stating "the Service must consider the merits of the petitioner's job offer, so that a determination can be made whether the job offer is realistic and whether the wage offer can be met"). *See also, Masonry Masters, Inc. v.*

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of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Thornburgh, 875 F.2d 898, 901 (D.C. Cir. 1989)(stating that a petitioner must "convince the INS that the job offer is realistic"). The filing of numerous other Form I-140 petitions is relevant to whether the job offered to the instant beneficiary is realistic.

Finally, counsel argues that there is insufficient guidance with respect to how a petitioner can establish its ability to pay the proffered wages to multiple beneficiaries. However, the method for determining a petitioner's ability to pay is the same whether there is one petition or numerous petitions. As discussed above, USCIS will first examine whether the petitioner has employed and paid the beneficiary as of the priority date. If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the petitioner's net income and, if necessary, the petitioner's net current assets.

In addition to the above analysis, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa.* The petitioner did not establish a pattern of profitable or successful years, that 2002 was uncharacteristically unprofitable or difficult for some reason, or that it has a sound business reputation. Further, as noted above, the petitioner has filed multiple Form I-140 petitions and has failed to demonstrate its ability to pay the proffered wages for all petitions. Therefore, considering the totality of the circumstances in the present case, the petitioner has not established that it has the ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.